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Decision 05-07-046 July 21, 2005

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Examine the Commission's Future Energy Policies, Administration and Programs.	Rulemaking 01-08-028 (Filed August 23, 2001)

ORDER DENYING APPLICATION FOR REHEARING OF DECISION (D.) 05-01-055

D.05-01-055 is an interim opinion in our Order Instituting Rulemaking (R.) 01-08-028, concerning implementation of provisions of Assembly Bill ("AB") 117 (Stats. 2002, ch. 838) relating to energy efficiency ("EE") program administrative structure. The purpose of the proceeding is to establish EE and conservation programs to achieve energy savings on a local and statewide basis. (D.01-11-066, p. 1-5 (slip op.).) Funding for EE programs is provided by the Public Goods Charge ("PGC"), which is a separate rate component established by Public Utilities Code Section 381(a). [1]

Several decisions have been issued in this rulemaking proceeding. We have adopted rules concerning EE programs and criteria that public utilities and non-public utility entities (hereinafter referred to as "IOUs" and "non-IOUs") should use when submitting EE proposals and applying for funding. [2] (See D.01-11-066, pp. 4-7 (slip. op.).) Programs for the years 2004-2005 were authorized by D.03-08-067, and in

[1] All statutory references are to the Public Utilities Code unless otherwise stated. EE programs are also provided for under the Reliable Electric Service Investments Act, Public Utilities Code Sections 399 through 399.15, enacted in 2000. Section 399.4(a)(1) provides that "it is the policy of this state and the intent of the Legislature that the commission shall continue to administer cost-effective energy efficiency programs authorized pursuant to existing statutory authority." (Pub. Util. Code,§ 399.4, subd. (a)(1).)

[2] Non-IOUs include private energy service companies, local government agencies, nonprofit organizations and other entities that provide energy savings measures to consumers.

that decision we dealt with issues regarding EE program funding, including development of rules by which cities and counties may aggregate local load and purchase power as community choice aggregators ("CCAs") pursuant to the requirements of Sections 381 and 381.1(a). (D.03-07-034, pp. 5-9 (slip. op.).) Funding of statewide and local IOU and non-IOU programs was approved pursuant to D.03-12-060.

In D.05-01-055, which is the subject of the instant application for rehearing, we resolved the issues involved in establishing an administrative structure for post 2005 EE programs. It described EE administration as encompassing "all the functions related to the planning, oversight and management of energy efficiency programs, including decisions on what programs to fund with ratepayer dollars." (D.05-01-055, p. 2.) It determined that the term "administration" or "administrative structure" did not include the tasks involved in program delivery, such as recruiting customers to participate in EE programs and the installation of EE measures or devices, equipment, etc. Entities performing these tasks were designated as "program implementers." (D.05-01-055, p. 3.)

The primary issue resolved by D.05-01-055 concerned the role of the IOUs in performing two key administrative functions: Program Choice and Portfolio Management.[3] A large number of individuals and organizations participated in the proceeding. They coalesced into four groups.[4] Two workshops were held; opening and reply comments were filed. Oral argument was held on September 30, 2004.

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[3] The decision defined these two functions as follows: "Program Choice involves the selection of activities and implementers for the portfolio of energy efficiency programs, and the allocation of ratepayers dollars to these activities for each funding cycle. Portfolio Management involves the day-to-day tasks associated with general administration and coordination of those ratepayer-funded programs between funding cycles." (D.05-01-055, p. 4.)

[4] The four groups were:

- IOUs Coalition: Pacific Gas and Electric Company (PG&E), San Diego Gas & Electric Company (SDG&E), Southern California Edison Company (SCE), Southern California Gas Company (SoCalGas), Building Owners and Managers Association, Coalition of California Utility Employers, Efficiency Partnership, Northern California Power Agency, Richard Heath and Associates, Inc. Sacramento Municipal Utility District and the Energy Coalition.
- WEM/SESCO Coalition: Women Energy Matters (WEM), SESCO, Inc. (SESCO), RESCUE, Community First Coalition and Local Power and Public Citizen.

(footnote continued on the next page)

We adopted the proposal advanced by both the IOU Coalition and the NRDC/LIF Coalition that the IOUs perform the key functions of program choice (subject to Commission oversight) and portfolio management (with input from advisory groups). D.05-01-055 explained that with the return of the IOUs to resource procurement the focus of EE has returned to resource acquisition. Since the IOUs are required to plan for supply side and demand side resources, we concluded that it is logical that they perform the two key functions of EE programs where they are subject to our regulatory control. We rejected the proposals by the WEM/SESCO and ORA/TURN coalitions for independent third party administrators on the ground that oversight would primarily rely on contractual authority, which would be a significant time consuming and burdensome task for Commission staff. We found this authority to be complex and weak as a result of its dependence on legal remedies such as either contract termination or on litigation. (D.05-01-055, p. 59.) We summarized our reasoning as follows:

> "Based on the above, we find that the administrative proposals recommended by ORA/TURN Coalition and WEM/SESCO Coalition would introduce significant start-up costs, uncertainty and delays in the future administration of energy efficiency programs. Moreover, by relying on a competitive RFP process for the selection of administrators, these approaches introduce the additional risk that the solicitations will not produce administrators with the requisite experience and capability to manage California's large energy efficiency program and meets the goals of the Energy Action Plan. As discussed above, the WEM/SESCO Coalition proposal magnifies this risk by delegating the role of program choice to individual

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(footnote continued from the previous page)

- TURN/ORA Coalition: The Utility Reform Network (TURN), Office of Ratepayer Advocates (ORA), San Diego Regional Energy Office (SDREO), City and County of San Francisco (CCSF) and K.J. Kammerer & Associates.
- NRDC/LIF Coalition: Natural Resources Defense Council (NRDC), Latino Issues Forum (LIF) American Council For An Energy-Efficient Economy, CHEERS, Electric Gas Industries Association, Equipoise Consulting, Heschong Mahone Group, Inc., ICF Consulting, KEMA-Xenergy, Nexant, Inc. and Silicon Valley Manufacturing Group.

> implementers competing among themselves to operate under standard offer contracts.
>
> In contrast, returning the IOUs to a lead role in program choice and portfolio management will not create the legal risks described above or require statutory changes. Transitioning from staff to IOU responsibilities would involve a relatively short transition period, and could be accomplished at an orderly pace that would not disrupt program delivery. Based on our experience with utility administration during the pre-restructuring (Collaborative) era, we are confident that the IOUs have the requisite expertise and capability to administer energy efficiency consistent with the Energy Action Plan and the savings goals we establish in this proceeding. That experience has demonstrated to us that IOUs can meet aggressive savings goals under an administrative structure that holds them directly accountable for program results." (D.05-01-055, p. 79.)

We also established certain safeguards in order to avoid IOU bias in the program selection process. These include the establishment of advisory groups, a ban on affiliate transactions between IOU administrators and program implementers, and Commission review of procurement plans with notice and the opportunity to comment. (D.05-01-055, pp. 65-101.)

In addition, D.05-01-055 adopted revisions for how evaluation, measurement and verification (EM&V) of EE programs should be organized. Commission staff is to assume managing and contracting responsibilities for EM&V studies related to measuring and evaluating the results of EE programs. Furthermore, we prohibited entities from performing program performance studies at the same time they are under contract for program delivery work. (D.05-01-055, pp. 86-89.)

An application for rehearing was filed by Women's Energy Matters ("WEM"). It contends that the Commission erred in D.05-01-055 by misinterpreting AB117 (specifically provisions codified in Public Utilities Code Section § 381.1(a)) because it failed to allow non-IOUs to become administrators of EE programs; erroneously concluding that the Commission lacks adequate regulatory jurisdiction over non-utilities; and failing to conclude, despite the overwhelming record, that the utilities

cannot be relied upon to select and manage EE programs that provide the greatest energy savings to ratepayers. In its rehearing application, WEM also requests oral argument.

We have reviewed each and every allegation set forth in WEM's application for rehearing, and find the allegations without merit. Accordingly, we deny WEM's rehearing application.

PG&E and SCE filed responses in opposition to WEM's application. They dispute WEM's contentions and argue that it simply repeats its unsuccessful arguments presented during the proceeding.

A. The Commission's Interpretation of Public Utilities Code Section 381.1(a)

Because the decision assigns, for the present time, only to the IOUs the responsibility for the program choice and portfolio management functions for EE programs in their respective service areas, WEM argues that the decision violates Section 381.1(a) which was enacted as part of AB117.[5] WEM asserts that the words "any party …

[5] In AB117 (Stats. 2002, Ch. 838.) the Legislature enacted provisions related to energy efficiency programs. (Those provisions, as codified in Sections 331.1, 366.2 and 381.1, established a legislative and electoral process whereby local governments may become a CCA in order to aggregate their electric load and provide electricity directly to their residents. Section 381.1(a) states as follows:

> "(a) No later than July 15, 2003, the commission shall establish policies and procedures by which any party, including, but not limited to, a local entity that establishes a community choice aggregation program, may apply to become administrators for cost-effective energy efficiency and conservation programs established pursuant to Section 381. In determining whether to approve an application to become administrators, the commission shall consider the value of program continuity and planning certainty and the value of allowing competitive opportunities for potentially new administrators. The commission shall weigh the benefits of the party's proposed program to ensure that the program meets the following objectives:
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> (1) Is consistent with the goals of the existing programs established pursuant to Section 381.
>
> (2) Advances the public interest in maximizing cost-effective electricity savings and related benefits.
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> (3) Accommodates the need for broader statewide or regional programs."
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> (Pub. Util. Code, § 381.1 subd. (a).)

may apply to become administrators …" renders unlawful the determination that the IOUs should execute the program choice and portfolio management functions of the EE programs.

This contention lacks merit. Although the decision assigned two key functions to the IOUs, it identified ten administrative functions related to EE programs: Policy Oversight, Quality Assurance, Research and Analysis in Support of Policy Oversight, Program Choice, Portfolio Management, Management of Portfolio-Level EM&V, Management of Individual Program EM&V, Fiscal Agent, Dispute Resolution, and Program Implementation. Non-IOUs will perform some of these functions, particularly EM&V related functions and the program implementation functions. In our prior decision in this proceeding (D.03-07-034, p. 7, fn. 2 (slip. op.).), we expressly reiterated the interpretation that "administrator" for purposes of AB 117 means "any entity implementing an energy efficiency program that is the subject of Section 382, which authorizes the expenditure of certain funds on energy efficiency programs." (D.05-01-055, p. 82.) [6] Program implementers will have administrative duties and responsibilities in carrying out EE programs in agreement with the portfolio manager. We explained this as follows:

> "Program implementers do perform administrative tasks necessary to manage the delivery of programs for which they are funded, including overseeing their contractors, collecting data, preparing invoices and reports. In fact, for this reason we refer to program implementers as "administrators" in other Commission decisions related to energy efficiency.

[6] In D.04-01-032, which denied rehearing of D.03-07-034, the Commission noted that the legislative history of AB 117 was silent as to the definition of administrator, and that therefore it had discretion in determining the definition. D.04-01-032 expressly rejected WEM's interpretation of Section 381.1(a). WEM's petitions for writ of review of these decisions in the Court of Appeal and in the California Supreme Court were both denied. (*Women's Energy Matters v. Public Utilities Commission of the State of California*, summarily denied by the California Court of Appeal, 1st Appellate District, Division 1 (Case No. A105529), on August 4, 2004, and review denied by California Supreme Court (Case No. S127183) on October 13, 2004.)

> However, for the purpose of establishing a common terminology for the key functions and areas of responsibility that we address today, we make a distinction between 'implementers' and the administrative functions presented above." (D.05-01-055, Attachment 1, p. 2, fn. 1.)

Additionally, Section 381.1(a) does not expressly define the term "administrator." Nor does it require that every party can act as an administrator. Our interpretation is further supported by the fact that subsection (b) expressly refers to parties "chosen as administrators under this section."[7] Similarly, subsection (c) provides directions to the Commission in the situation where a CCA (i.e. a non-IOU) is not the administrator of EE and conservation programs.[8] These subsections clearly indicate that the Legislature intended to provide us with the discretion to select the administrative structure it deemed most effective; and not, as WEM asserts, to be under compulsion to

[7] Section 381.1(b) states as follows: "All audit and reporting requirements established by the Commission pursuant to Section 381 shall apply to the parties chosen as administrators under this section" (Pub. Util. Code § 381.1 subd. (b); emphasis added)

[8] Section 381.1(c) states as follows:

> "If a community choice aggregator is not the administrator of energy efficiency and conservation programs for which its customers are eligible, the commission shall require the administrator of cost-effective energy efficiency and conservation programs to direct a proportional share of its approved energy efficiency program activities for which the community choice aggregator's customers are eligible, to the community choice aggregator's territory without regard to customer class. To the extent that energy efficiency and conservation programs are targeted to specific locations to avoid or defer transmission or distribution system upgrades, the targeted expenditures shall continue irrespective of whether the loads in those locations are served by an aggregator or by an electrical corporation. The commission shall also direct the administrator to work with the community choice aggregator, to provide advance information where appropriate about the likely impacts of energy efficiency programs and to accommodate any unique community program needs by placing more, or less, emphasis on particular approved programs to the extent that these special shifts in emphasis in no way diminish the effectiveness of broader statewide or regional programs. If the community choice aggregator proposes energy efficiency programs other than programs already approved for implementation in its territory, it shall do so under established commission policies and procedures. The commission may order an adjustment to the share of energy efficiency program activities directed to a community aggregator's territory if necessary to ensure an equitable and cost-effective allocation of energy efficiency program activities." (Pub. Util. Code § 381.1, subd. (c), emphasis added.)

allow every party to perform the program choice and portfolio management functions. Both of these subsections support the interpretation that while we are required to conduct a procedure which would allow any party to be considered for the administrator role, we were provided the discretion to determine what administrative roles would best be provided by the specific parties involved.

This interpretation is consistent with the fundamental rule of statutory interpretation that the intent of the Legislature should be ascertained to effectuate the purpose of the law. (*People v. Hull* (1991) 1 Cal.4th 266, 271.) "In determining the intent [one should] look first to the words of the statute themselves, giving them their usual and ordinary meaning." (*City of Santa Cruz v. Municipal Court* (1989) 49 Cal. 3d 74, 90; see also *Tracy v. Municipal Court* (1978) 22 Cal.3d 760, 764.) Furthermore, the words in a statute "must be construed in context, keeping in mind the nature and obvious purpose of the statute where they appear." (*Moyer v. Workmen's Compensation Appeals Board* (1973) 10 Cal3d 222, 230 [citations omitted]; see also, *People v. Baker* (1968) 69 Cal.2d 44, 50 (courts should not insert or delete words in a statute or give a different meaning to the words used).) WEM's interpretation of the section would insert the word "every" for "any" and undermine the purpose of the legislation, which is the establishment of an orderly administrative structure for executing EE programs. It would deny to the Commission the choice of administrators expressly referred to in subsections (b) and (c). Thus, our interpretation comports with the rules of statutory construction, and is lawful.

B. Definitions of "Administrator"

WEM asserts that D.05-01-055 uses contradictory definitions of the term "administrator" which it claims is unlawful. It contends that the decision first defines "administrator" as constituting those functions involving program choice and portfolio management, yet at the same time declares that this term encompasses or means implementation by program implementers. Because the decision assigns the program choice and portfolio management functions only to the IOU's, WEM alleges that the

decision disregards the true meaning of the term "administrator" in Section 381.1(a) as intended by the Legislature at the time of its passage. WEM maintains that the Commission is required by law to presume that the Legislature was aware of our meaning of this term at the time it enacted AB117 as applying to both IOU's and non-IOUs. Therefore, according to WEM, we cannot now assign these two functions only to the IOU's, thereby interpreting the term as applying only to them. (Rehrg. App., pp. 6-7.)

We disagree. First, the decision does not define "administrator" to have two different meanings. And, as pointed out above, the statute does not define the term. The decision assigns two administrative functions to the IOU's. The Commission has the discretion to identify the functions deemed necessary to form an effective administrative structure, and then assign them to the specific parties deemed best qualified to execute them. Second, there is no requirement, explicit or implicit, in Section 381.1(a) that requires the program choice and portfolio management functions to be assigned to all parties. Moreover, WEM fails to discuss the fact that the statute does not grant non-IOUs the authority to hold, manage or control ratepayer funds collected for the EE programs.

The decision reaffirms our interpretation of "administrator" adopted in D.03-07-034. We explained that program implementers would be responsible for certain other administrative functions, but that for the purpose of establishing a common terminology for the two key functions in establishing an administrative structure, we adopted a distinction between "implementers" and "administrators". (D.05-01-055, p. 3 and Attachment 1, p. 2, fn. 1) Therefore, we exercised our discretion under Section 381.1(a), and thus, lawfully determined that the initial administrative structure should place the two key functions with the IOUs.

In support of its argument WEM relies on *Robinson v. Fair Employment & Housing Commission* (1992) 2 Cal. 4th 226, for the proposition that the Commission is bound by its use of the term "administrator" in existence at the time AB117 was enacted. Since the Commission's Energy Efficiency Manual in existence at that time did not limit the term to IOUs, WEM argues that the Legislature intended that the statutory term be

given the same meaning by the Commission. WEM fails to offer any evidence of legislative history in support of its position. WEM advanced this argument earlier, in its court challenge of D.03-07-034 and D.04-01-032, and it was rejected because the interpretation of "administrator" was a first-time interpretation.[9] In our opinion the *Robinson* case continues to be inapplicable because the interpretation in D.05-01-055 of "administrator" for the purposes of AB117 is consistent with our earlier interpretation, which was upheld by the denial of the petitions for writ of review. (See D.03-07-034, p. 11 (slip op.).) Therefore, we conclude that WEM's contention does not demonstrate legal error.

C. AB117's Preference for Increasing Competition in the Provision of Energy Efficiency Administrative Services

WEM's next argument is based on the language in Section 381.1(a) that since the IOUs are not expressly included in the list of criteria the Commission is to consider in designating administrators for EE programs, the IOUs are excluded under the maxim: "the expression of some things in a statute necessarily means the exclusion of other things not expressed." It then cites two court decisions: G*ikas v. Zolin* (1993) 6 Cal.4th 841 and *In re J.W.* (2002) 29 Cal.4th 200.

This same argument was advanced by another party (RESCUE) in its application for rehearing of D.03-07-034. It was rejected in D.04-01-032 which denied rehearing. WEM then relied on these two court decisions in its petitions for writ of review that were summarily denied. This argument continues to lack merit because there is no

[9] WEM's contentions in this application for rehearing regarding the interpretation of Section 381.1(a) may be barred under the doctrine of res judicata. The doctrine bars relitigation of the same cause of action by the same parties. (*Consumers Lobby Against Monopoly v. Public Utilities Com.* (1979) 25 Cal.3d 891, 901; see also Pub. Util. Code, § 1709.) In its petitions for judicial review of D.03-07-034 and D.04-01-032 WEM included its argument that the term "administrator" should be interpreted broadly to confer upon non-IOUs the power to contract with EE providers and hold, manage and control PGC funding.

preclusive language in the statute that prohibits selection of an IOU as an administrator. (See D.04-01-032, pp. 10-11.)

D. Compliance with Schedule Requirements in Section 381.1(a)

WEM maintains that the Commission has failed to comply with Section 381.1(a)'s requirement that it establish "policies and procedures" by July 15, 2003 "for any party" to become an administrator. It provides no authority in support of this contention. It simply argues that since under the decision only IOU's can perform the administrative roles of program choice and portfolio management the schedule requirement in the statute has not been followed.

This argument also lacks merit. Contrary to WEM's assertion, a procedure (i.e. a rulemaking proceeding R.01-08-028) was initiated in 2001 to implement the statutory requirements for establishment of an application process to become administrators. There have been several interim decisions resolving separate phases of this process. Accordingly, there has been compliance. WEM raised this schedule violation argument in its application for rehearing of D.03-07-034, and it was rejected in D.04-01-032 and by the Court in its summary denial of judicial review. (See *Women's Energy Matters v. Public Utilities Commission of the State of California*, summarily denied by the California Court of Appeal, 1st Appellate District, Division 1 (Case No. A105529) on August 4, 2004, and review denied by the California Supreme Court (Case No. S127183) on October 13, 2004.) It does not provide any new reasoning or authority in support of its position. Thus, this argument has been heard and dealt with in the past. The renewal of the argument constitutes an impermissible collateral attack. (See Pub. Util. Code, § 1709.)

In summary, with regard to WEM's contentions regarding statutory interpretation, it has failed to demonstrate legal error.

E. IOUs versus Non-IOUs Administration of PGC Funds

WEM claims that D.05-01-055 erroneously concludes that the Commission can exercise less control over non-IOU's than over IOUs. WEM believes such contract remedies as restitution, monetary damages and specific performances provide stronger remedies for regulatory control than the Commission's statutory IOU jurisdiction because under the latter the utilities are protected by the requirement that they are allowed to recover their reasonable costs plus a fair return. (Rehrg. App., p. 10.)

This claim by WEM repeats its position taken during the proceeding. (See WEM's Reply Comments Re Selected Administrative Structure Issues, dated October 25, 2004, pp. 1-6.) But it fails to cite any new legal authority or evidence demonstrating legal error. We noted that the Commission can exercise jurisdiction over non-IOU contractors as long as their work is cognate and germane to utility regulation. (D.05-01-055, p. 60.) However, we explained the disadvantages of WEM's proposal given the experience with the attempted independent administration of EE programs during 1997-2000. (D.05-01-055, p. 27-33.) Our decision emphasized the impediments in attempting to establish independent administration, including the time and effort required for the Energy Division to review and approve contract invoices and provide other aspects of contract management; and the risk of possible legal entanglement arising from the performance of energy efficiency functions by independent contractors rather than state employees. In addition, it noted the delay and uncertainty of the outcome in any effort to secure needed legislation allowing the transfer of PGC funds, as was required for telecommunications public purpose funds. (D.05-01-055, p. 34 and 71.)

Finally, WEM's application fails to present any argument or facts disputing Findings of Fact 18 and 19 that the WEM proposal for independent administration could result in poor or complete lack of coordination between multiple administrators; and that customers would be faced with multiple and sometimes overlapping programs. (D.05-01-

055, p. 134.) WEM simply disagrees with the decision and reargues its position. This does not establish legal error.

F. Potential Risk In Transferring PGC Funds to Non-IOUs for Administration

WEM disagrees with our conclusion that placing the lead administrative role with the IOUs avoids the potential legal difficulties and challenges faced by the Commission during 1998 when it attempted to establish independent (i.e. non-IOU) administrators for EE programs. In fact, WEM argues that the assignment of such functions to IOUs faces the same legal challenges.

We believe that this argument is incorrect. The record adequately supports our conclusion. As one basis for selecting the IOUs to perform the lead administrative functions, we set out the past legal difficulties involved in the attempt to contract with independent parties for EE program administration in 1998. It was characterized as the privatization of EE services in the market place.[10] However, it was soon challenged by civil service unions; and the Attorney General and Department of Finance expressed the opinion that PGC funds could not be transferred to an outside trust for use by an independent party without legislation. Legislation designed to allow this was introduced in 1998, passed by the Legislature, and then vetoed. Furthermore, in 1999 legislation was enacted that required low-income customer EE services programs be administered by the IOUs. (See D.05-01-055, pp. 31-34; and 72-75.)

WEM asks us to overlook these facts. WEM further argues that under Government Code Section 19130, the assignment of administrative functions to the IOUs faces the same legal risks. We disagree. Given the legislative history described above, the risks of uncertainty and delay exist in securing legislative authorization for independent administration of EE programs and the transfer of PGC funds to them.

[10] Re Proposed Policies Governing Restructuring California's Electric Services Industry and Reforming Regulation [D.97-02-014] (1997) 70 Cal.P.U.C.2d 774, 784.

G. Conflict of Interest Allegations

Next, WEM asserts assignment of these lead functions to the IOUs is unlawful because it is a transfer to private entities with a conflict of interest. According to WEM, the IOUs will be biased towards their affiliates and against their competitors, the independent EE contractors, in selecting programs and awarding funds. WEM relies on *State Board v. Thrift-D-Lux Cleaners* (1953) 40 Cal.2d 436, which found a statute invalid that created a 7-member State Board of Dry Cleaners to set prices where six of the members were in the dry cleaning business. The California Supreme Court noted that there was no guidance in the statute for the assignment. (Id. at p. 448.) We note that this court decision is distinguishable. In D.05-01-055, we have established specific guidance by means of the structural safeguards imposed on the IOUs to address conflict of interest problems. These include a mandatory set aside to non-IOUs of 20 percent of funding for the entire portfolio of EE programs; the establishment of advisory groups; and a ban on all affiliate transactions between the IOUs and program implementers. (See D.05-01-055, pp. 84-85.)

Finally, WEM cites *PG&E Corp. v. Public Utilities Com.* (2004) 118 Cal.App.4th 1174 for the proposition that the Commission can exercise limited regulatory jurisdiction over non-utilities, if authorized by statute. Therefore, it concludes that the Commission can regulate such non-IOUs by imposing conditions on the IOUs to, in turn, impose conditions on the non-IOUs they contract with for EE programs. Although WEM is correct that the Commission has authority over non-IOUs,[11] the pertinent issue is not regulatory jurisdiction. The question is whether non-IOU EE providers can hold and distribute PGC funds. No such statute provides such authority. As discussed above, there would be delay and uncertainty to ascertain such statutory authority so that non-IOUs could hold and disburse PGC funds collected from ratepayers. Further, permitting non-

[11] See *Wise v. PG&E Co*. (1999) 77 Cal.App.4th 287, 299; and *Commission Lobby Against Monopoly v. Pub. Util. Com., supra,* 25 Cal.3d at p. 905.

IOUs to hold and disburse such funds without such statutory authority could result in possible legal entanglements, delay, and uncertainty in implementation.

H. The Record Evidence

In its application for rehearing, WEM sets forth several arguments relating to its disagreement with D.05-01-055, including the following:

> (1) Its alleged failure to adequately protect against IOU bias in selecting EE programs and to provide for conducting competitive solicitations for choosing the best programs and contractors. WEM doubts the effectiveness of advisory groups to protect against IOU conflicts of interest on the ground that the IOUs will exercise control over them. It insists that an incentive mechanism will not solve the problem of IOU bias, and only wastes money. It predicts that the new EM&V structure adopted in the decision will not solve the problem of IOU bias in this area. (Rehrg. App., pp. 19-26.)
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> (2) The alleged failure to establish an EM&V structure that addressed alleged gaming of the system in the past.
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> (3) The past alleged deficiencies of the operation of the California Measurement Advisory Council ("CAL MAC") which was established in 1999 to provide a forum for reviewing post-1998 market assessment and evaluation studies.
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> (4) Alleged gross exaggeration by the IOUs of energy savings from the program for compact fluorescent lights.

The issues WEM raises are policy arguments that constitute the reargument of its positions advocated during the proceeding or predictions that certain elements of the decision will not work out as anticipated. WEM fails to demonstrate how these arguments constitute legal error. These arguments are merely speculative, and without merit. (See D.05-01-055, pp. 77-79 & 132-135.)

Therefore, WEM has not met the requirement of Section 1732 that an applicant for rehearing "set forth specifically the ground or grounds on which the applicant considers the decision or order to be unlawful." Furthermore, Rule 86.1 of the

Commission's Rules of Practice and Procedure provides that "vague assertions as to the record or the law, without citation, may be accorded little attention. (Code of Regs., tit. 20 § 86.1.)

Finally, WEM submits several additional allegations and predictions, including:

(1) Phantom energy savings may lead to another energy crisis;

(2) That PG&E has used EE funds for political purposes;

(3) That the decision misreads and misunderstands WEM's proposal;

(4) That CCAs are in a better position to pursue least-cost and least-polluting programs than the IOUs;

(5) That the connection between procurement of supply-side and demand-side energy resources is flawed.

Again all of these contentions constitute disagreement with the decision, on policy rather than legal grounds, and merely contain further arguments why WEM's proposal should have been adopted. These opinions were presented during the proceeding. However, they do not demonstrate legal error justifying rehearing.

In sum, none of WEM's contentions challenging our determinations are persuasive. WEM disagrees how we weighed the evidence in reaching our decision in D.05-01-055. Our determination is based on the proposals presented during the proceeding. We considered all the proposals and comments presented in this rulemaking proceeding. Workshops were held, and comments and reply comments were filed. After weighing the evidence we concluded that the proposal recommended by the IOU Coalition and the NRDC/LIF Coalition best met the needs for prompt implementation of essential

EE programs. The findings, based on the record, clearly demonstrate why WEM's proposals were found unpersuasive.[12] (See D.05-01-055, Findings of Fact Nos. 13-22.)

I. WEM's Request For Oral Argument

In its rehearing application, WEM requests an oral argument regarding the issues raised in its application for rehearing. Rule 86.3 of the Commission's Rules of Practice and Procedure specifies that oral argument will be considered if the application "demonstrates that oral argument will materially assist the Commission in resolving the application, and . . . raises issues of major significance for the Commission." (Code of Regs., tit. 20 § 86.3.) In this instance WEM has failed to demonstrate the need for an oral argument, as required by the criteria set forth in Rule 86.3. WEM simply requests oral argument alleging that it has complied with Rule 86.3. We disagree because WEM fails to provide any detailed explanation of what the subject of such argument would be. Therefore, WEM fails to meet the requirements for the granting of a request for oral argument. Accordingly, the request for oral argument will be denied.

[12] WEM briefly states that it incorporates by reference the grounds previously stated during the proceeding by the Utility Reform Network (TURN) objecting to D.05-01-055; and also the dissenting opinion by Commissioner Lynch in D.04-01-032. (WEM App. P. 2.) WEM fails to include any specific discussion in its rehearing application relating to why TURN's objections or the dissenting opinion justifies rehearing. TURN did not file an application for rehearing and a Commissioner's dissenting opinion represents only an unadopted minority point of view. This attempt to expand WEM's application for rehearing without any specificity constitutes a further failure to comply with Section 1732 and Rule of Procedure 86.1.

Therefore, **IT IS ORDERED** that the application for rehearing of D.05-01-055 filed by Women's Energy Matters is hereby denied.

This order is effective today.

Dated July 21, 2005 at San Francisco, California.

MICHAEL R. PEEVEY
President
GEOFFREY F. BROWN
SUSAN P. KENNEDY
JOHN A. BOHN
Commissioners

Comr. Grueneich recused herself
from this agenda item and was not
part of the quorum in its consideration.